INDEX.

PAGE

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit... 1

Jurisdiction 2
Statute Involved 2
Statement 2
Decisions Below 4
Questions Presented 6
Specifications of Errors to Be Urged..... 8
Reasons for Granting the Writs 10

Brief in Support of Petition for Writs of Certiorari. 15

Summary of Argument..... 15

POINT I—The Court below, in holding that the written charters did not supersede and cancel the prior oral charters, has rendered a decision in conflict with decisions of the Circuit Courts of Appeals in the Eighth and Fifth Circuits, and with one of its own previous decisions..... 15

POINT II—The Court below erred in failing to apply Section 33(2) of the Personal Property Law of New York and to hold that the written charters, because of that Statute, needed no consideration and hence were valid and effective instruments to supersede and cancel the prior oral contracts.... 22

POINT III—The Court below, in holding that the respondent's letter of protest was effective to preserve its rights under the oral charters and to negative the complete integration of the agreement of the parties, has rendered a decision in direct conflict with decisions of this Court..... 24

POINT IV—The decision of the Court below, in holding that the written charters should be treated as a proper attempt by the respondent to mitigate damages, is in conflict with a decision of the Circuit Court of Appeals for the Eighth Circuit.. 28

PAGE

POINT V—The decision of the Court below is opposed to the parol evidence rule, under which all prior oral agreements, in the absence of fraud or mistake, are merged in the written agreement covering the particular subject matter 29

Conclusion 35

LIST OF CASES:

Addison E. Bullard, The, 258 Fed. 180 (C. C. A. 5)... 31
Ainesworth Coal & Iron Co. v. *Grangesberg Oxelosund*, 287 Fed. 291 (C. C. A. 4)..... 31

Borin Corporation v. *Commissioner of Internal Revenue*, 117 Fed. (2d) 917 (C. C. A. 6)..... 31
Bryant v. *Bryant, et al.*, 295 Pa. 146..... 31

J. B. Colt Company v. *Gregor*, 328 Mo. 1216..... 31
Consumers' Cotton-Oil Co. v. *Ashburn*, 81 Fed. 331 (C. C. A. 5).....10, 17, 27
Corey v. *Woodin*, 195 Mass. 464..... 20

Delaware, The, 14 Wall. 579..... 30

Edgar v. *Joseph Breck & Sons Corporation*, 172 Mass. 581..... 20
Endriss v. *The Belle Isle Ice Co.*, 49 Mich. 279..... 29

Gilbert v. *U. S.*, 8 Wall. 358..... 25
Greenwich Sav. Bank v. *Cabin Holding Corp. et al.*, 176 Misc. 89, 26 N. Y. S. (2d) 791..... 11
Griffin Mfg. Co. v. *Boom Boiler & Welding Co.*, 90 Fed. (2d) 209, 212 (C. C. A. 6)..... 31
Gronvold et al. v. *Suryan*, 12 Fed. Supp. 429, 430.... 31

Housekeeper Pub. Co. v. *Swift, et al.*, 97 Fed. 290 (C. C. A. 8).....10, 16, 19

Jaeger v. *Canter*, 13 N. Y. S. 414..... 11

Kane Realty Co. Inc. v. *National Children's Stores, Inc.*, 169 Misc. 699, 8 N. Y. S. (2d) 505..... 11
Klies v. *Niagara Fire Insurance Co.*, 117 Mich. 469.. 32

PAGE

Lawrence v. *Porter*, 63 Fed. 62 (C. C. A. 6)..... 28
Litchenberg v. *Harvey et al.*, 57 Fed. (2d) 82 (C. C. A. 2).....10, 17
Lottawanna, The, 21 Wall. 558.....6, 23
Luster et al. v. *Gilruth*, 60 Fed. (2d) 751 (C. C. A. 8).....10, 12, 15, 28, 29, 34

MacLaren v. *Windram Mfg. Co.*, 287 Mass. 221..... 20
Matthias v. *Beeche et al.*, 111 Fed. 940, 941 (E. D. N. Y.) 31
McCabe Constr. Co. v. *Utah Const. Co.*, 199 Fed. 976 .....10, 12, 17, 27, 29
Melrose, The, 1926 A. M. C. 1585 (S. D. N. Y.)..... 31
Metropolitan Casualty Ins. Co. of New York v. *Banks*, 76 Fed. (2d) 68 (C. C. A. 3)..... 31

Parish et al. v. *United States*, 8 Wall. 489.....11, 26

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109...6, 23
Ries v. *Dodson*, 46 Fed. (2d) 68, 70 (C. C. A. 3)..... 31
Robbs Express Co. v. *Ferkel*, 200 Ill. App. 471..... 31

Seitz v. *Brewer's Refrigerating Machine Co.*, 12 Sup. Ct. Rep. 46, 47, 48 (141 U. S. 510).....12, 34
Shea v. *Cutler*, 147 Iowa 366, 126 N. W. 366..... 34

United States v. *Lamont*, 15 Sup. Ct. Rep. 97 (155 U. S. 303).....11, 24

Whittier v. *Goldberg*, 274 Mass. 325..... 31

STATUTES AND COURT RULES:

Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)):
Section 240(a) 2
Personal Property Law of New York, Section 33 (2) 2, 5, 7, 8, 9, 11, 13, 22, 23, 24
Rules of the Supreme Court of the United States, General Rule 38..... 2

TEXTBOOKS AND TREATISES:

Corpus Juris Secundum, Vol. 17, Section 381, pages 872-874 .....30, 32

IN THE

Supreme Court of the United States

OCTOBER TERM—1941.

Nos. .....

BLACK DIAMOND LINES, INC.,
Petitioner,

—against—

UNITED STATES NAVIGATION CO., INC.,
Respondent.

BLACK DIAMOND LINES, INC.,
Petitioner,

—against—

UNITED STATES NAVIGATION CO., INC.,
Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Black Diamond Lines, Inc., the petitioner herein, prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decision of that Court, rendered on January 5, 1942 (R. 30-36), reversing decrees of the United States District Court for the Southern District of New York in favor of the petitioner (respondent in the District Court) and overruling the petitioner's exceptions to the libels herein.

Jurisdiction.

The date of the judgments of the Circuit Court of Appeals to be reviewed is January 21, 1942 (R. 37). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 (a)) and under General Rule 38 of this Court, Section 5, subdivision (b).

Statute Involved.

The Statute involved is Section 33 (2) of the Personal Property Law of New York, which reads as follows:

> "2. An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement changing, modifying or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge."

Statement.

There are two suits involved, but the libels are practically identical, except for such necessary variations as the names of the vessels, delivery dates, amounts of damages claimed, etc. Since the two records are virtually the same, we shall refer to the record involving the steamer *Black Hawk* as typical. At the

suggestion of the Clerk of this Court, we are filing one petition and brief for both cases, in order to avoid unnecessary duplication.

The respondent sued the petitioner in admiralty in the United States District Court for the Southern District of New York, charging that the petitioner breached oral agreements to charter the petitioner's steamers *Black Hawk* and *Black Tern* to the respondent for certain periods.

The libels (R. 2-5) allege that the parties, on December 27, 1939, entered into oral agreements whereby the petitioner agreed to charter the *Black Hawk* and *Black Tern* to the respondent for a period of two to about five months, trading South Africa, Capetown/Beira range, South America or the Far East, in which agreements were incorporated by reference the provisions of the standard Government form New York Produce Exchange time charter, with certain modifications and additions.

The libels further allege that the terms of the oral charters were to be written out and signed, and that the petitioner's broker accordingly wrote up the agreements (Schedule A, attached to the libels); that the petitioner, when the proposed charters were presented to it for execution, refused to sign them unless they contained a limitation of the period of hire to one round voyage only for the geographical areas mentioned; and that the respondent, because of the petitioner's threatened breach of the oral agreements, signed the written charters with the single round voyage limitation and returned them to the petitioner with a letter (R. 11) stating that as they did not correctly set forth the agreed periods and trading limits they were signed under protest and with reservation of the respondent's rights.

It is further alleged that the vessels entered into the respondent's employment and that each made a voyage from New York to ports in South Africa, Capetown/Beira range, and back to an Atlantic port; that upon the completion of the first round voyage the respondent directed the vessels to proceed on a second round voyage to the South African ports within the specified range and period, but that the petitioner refused to let the respondent have the vessels for the remainder of the period and withdrew them from the respondent's service, and that as a result the respondent was obliged to charter two other vessels for the balance of the period and sustained damages totaling $141,237.66.

The petitioner excepted to the libels on the ground that they failed to state causes of action against the petitioner (R. 12).

Decisions Below.

The opinion of the District Court is printed on pages 13-15 of the record and is reported in 37 Fed. Supp. 1005 (*United States Navigation Co., Inc.* v. *Black Diamond Lines, Inc.*). The opinion of the Circuit Court of Appeals is printed at pages 30-36 of the record. It has not yet been officially reported.

The District Court, taking all well pleaded allegations of the libels as true for the purpose of the exceptions, found that the parties had entered into oral contracts for the charter of the vessels, which were breached by the petitioner when it refused to sign them, after they had been written up, unless the limitation to one round voyage was inserted; that the respondent could have rested on the oral agreements and sued for damages for their breach but

had not chosen to do so, but on the contrary had signed the charter parties in the form demanded by the petitioner, thereby abandoning its rights under the oral contracts, the terms of which became merged in the written signed contracts (R. 13-15).

The Court made findings of fact and conclusions of law, restricted to the disposition of the exceptions (R. 16-21). In its seventh conclusion of law (R. 21) it ruled that the legal consequences of the respondent's execution of the written contracts were not affected by its letter of protest to the petitioner.

The Court sustained the petitioner's exceptions to the libels on the ground that no causes of action were stated against the petitioner, and dismissed the libels (R. 22, 23).

The Circuit Court of Appeals (L. Hand, *J.*, dissenting) reversed the decrees of the District Court and overruled the petitioner's exceptions, with leave to the petitioner to join issue and proceed to trial.

The majority held that the written charters did not cancel or rescind the oral ones because the written charters embodied an agreement for one voyage only instead of two voyages, and that the oral and written charters were therefore *pro tanto* consistent, and the oral charters remained in effect as to a second voyage. The Court also held that the written charters were not effective to displace the oral ones because of lack of consideration and that the respondent's letter of protest and reservation of rights demonstrated that the written charters were not a complete integration of the agreement of the parties. The Court further held that Section 33 (2) of the New York Personal Property Law did not affect the cases and anyway would not invalidate the oral charters unless the written charters amounted to a rescission of the oral

charters, and the written charters, the Court said, were only a *pro tanto* rescission of the oral ones. The Court said finally that the written charters should be treated as a proper attempt by the respondent to minimize damages (R. 30-35).

Judge Learned Hand, dissenting, viewed the respondent's letter of protest as meaning that it accepted the petitioner's offer, because it was forced to, but claimed that it still had its rights under the oral contracts and added that the respondent's defense could rest only on the validity of the excuse and would not be aided by the reservation. He construed the written charters as cutting off the option in the oral charters for a second round voyage and said that the written charters therefore modified a pre-existing contract and thus came directly within the New York statute and needed no consideration. He thought the New York statute applicable to maritime contracts such as these, under the authority of *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, and *The Lottawanna*, 21 Wall. 558, 581 (R. 35, 36).

Questions Presented.

1. Whether the respondent abandoned its rights under the oral charters by subsequently executing the written charters, which were the same as the oral charters, except for the single voyage limitation.

2. Whether the written charters superseded and cancelled the oral charters.

3. Whether the written charters required any additional consideration to make them effective to supersede and cancel the oral charters.

4. Whether Section 33 (2) of the Personal Property Law of New York applies to charter parties executed in New York, and, if so, whether the written charters needed any consideration to make them valid.

5. Whether the written charters constituted a modification of the oral charters, and, if so, whether the written charters needed any consideration to make them valid, in view of Section 33 (2) of the New York Personal Property Law.

6. Whether the respondent could preserve its alleged rights under the oral charters by sending to the petitioner a letter stating that the charters were signed under protest and with reservation of the respondent's rights.

7. Whether the respondent's letter of protest can be considered along with the written charters as showing that the written charters did not constitute a complete integration of the agreement of the parties.

8. Whether the written charters can properly be treated as an attempt by the respondent to minimize damages.

9. Whether the terms of the oral charters were merged in those of the written charters upon the execution of the latter.

10. Whether the parol evidence rule precludes the respondent from relying on the oral charters after its subsequent execution of the written charters.

11. Whether the written charters are conclusively presumed to express the agreement of the parties.

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In failing to hold that the oral and written charters were in conflict with each other.

2. In holding that the written charters did not cancel or rescind the oral agreements *in toto.*

3. In holding that the written charters, *pro tanto,* were wholly consistent with the oral charters.

4. In holding that the written charters covered only a part of the subject matter embraced in the prior oral charters and that therefore the written charters were not a substitute for the oral charters, which remained in effect to the extent that they were not included in the written charters.

5. In failing to hold that the second of two conflicting contracts, entered into between the same parties with respect to the same subject matter, supersedes and cancels the first.

6. In holding that the written charters required a consideration in order to be effective as a cancellation and rescission of the oral charters.

7. In holding that the written charters were without consideration.

8. In holding that the cases are not affected by Section 33(2) of the Personal Property Law of New York.

9. In failing to hold that Section 33(2) of the Personal Property Law of New York applies to the written charters and makes them valid without consideration.

10. In failing to hold that the effect of the signed charters was to cut off the option of a second African round voyage, allowed in the oral charters, and that this constituted a modification of the oral charters, within Section 33(2) of the Personal Property Law of New York.

11. In failing to hold that the legal consequences resulting from the respondent's execution of the written charters were not affected by its letter of protest.

12. In holding that the respondent's letter of protest demonstrated that there was no complete integration of the agreement of the parties in the written charters.

13. In failing to hold that the respondent abandoned its rights under the oral charters by executing the written charters.

14. In failing to hold that the respondent should have refrained from executing the written charters, if it wished to preserve the rights which it claimed to have under the oral charters.

15. In holding that the written charters should be treated as a proper attempt by the respondent to mitigate damages.

16. In failing to hold that the written charters are conclusively presumed to express the whole agree-

ment of the parties, in the absence of mistake or fraud, and that evidence of the prior oral charters therefore is not admissible to contradict or modify the written charters.

17. In failing to hold that the terms of the prior oral charters were merged in the written charters.

18. In failing to hold that the respondent's suits on the oral charters were improper, as an attempted evasion of the parol evidence rule.

19. In failing to hold that the written charters constituted a complete integration of the agreement of the parties as a matter of law.

20. In reversing the decrees of the District Court and overruling the petitioner's exceptions to the libels.

Reasons for Granting the Writs.

1. The decision below, in holding that the written charters did not cancel and rescind the prior oral charters, is in direct conflict with decisions of the Circuit Courts of Appeals for the Fifth and Eighth Circuits, in *Consumers' Cotton-Oil Co.* v. *Ashburn,* 81 Fed. 331 (C. C. A. 5); *Housekeeper Pub. Co.* v. *Swift, et al.,* 97 Fed. 290 (C. C. A. 8) and *Luster et al.* v. *Gilruth,* 60 Fed. (2d) 751 (C. C. A. 8). It is also in conflict with the decision of the United States District Court for the District of Oregon in *McCabe Constr. Co.* v. *Utah Const. Co.,* 199 Fed. 976, and the lower Court's previous decision in *Lichtenberg* v. *Harvey et al.,* 57 Fed. (2d) 82 (C. C. A. 2).

2. The decision below, in holding that the written charters were without consideration, and therefore did not cancel or rescind the prior oral charters, is in conflict with all the decisions listed in the preceding paragraph.

3. The decision below, because of its conflict with the decisions listed in preceding paragraph 1, throws into confusion the law as to what legal consequences flow from the execution of two conflicting contracts by the same parties covering the same subject matter.

4. The Court below failed to apply Section 33(2) of the Personal Property Law of New York to these written charters and to hold that they therefore were effective to supersede the prior oral charters without consideration.

5. The decision below, in construing Section 33(2) of the Personal Property Law of New York as inapplicable to the written charters, has decided an important question of local law in a way probably in conflict with applicable local decisions, namely, *Greenwich Sav. Bank* v. *Cabin Holding Corp. et al.,* 176 Misc. 89; 26 N. Y. S. (2d) 791; *Kane Realty Co. Inc.* v. *National Children's Stores, Inc.,* 169 Misc. 699, 8 N. Y. S. (2d) 505; and *Jaeger* v. *Canter,* 13 N. Y. S. 414.

6. The decision below, in holding that the respondent's letter of protest was effective to preserve its rights under the oral charters, is in conflict with this Court's decisions in *United States* v. *Lamont,* 15 Sup. Ct. Rep. 97 (155 U. S. 303), and *Parish et al.* v. *United States,* 8 Wall. 489, and the decision of the

United States District Court for the District of Oregon, in *McCabe Constr. Co.* v. *Utah Const. Co.*, 199 Fed. 976.

7. The doctrine laid down by the Court below makes it possible for a party to execute a complete written agreement, without compulsion, fraud or mistake, and, at the same time, by making a protest, to avoid the legal consequences of his act and preserve his rights under a prior oral agreement covering the same subject matter.

8. The decision below, in holding that the written charters should be treated as a proper attempt by the respondent to mitigate damages, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Luster et al.* v. *Gilruth*, 60 Fed. (2d) 751, and with the decision in *McCabe Constr. Co.* v. *Utah Const. Co., supra.*

9. The decision below conflicts with the rule excluding evidence of prior or contemporaneous oral agreements to contradict or modify a written contract, and also with the rule that a written contract complete on its face, barring accident, fraud, or mistake, is conclusively presumed to express the whole agreement of the parties.

10. The Court below, in holding that the written charters were not a complete integration of the agreement of the parties by reason of the respondent's letter of protest, has laid down a rule in conflict with the ruling of this Court in *Seitz* v. *Brewers' Refrigerating Machine Co.*, 12 Sup. Ct. Rep. 46, 47, 48 (141 U. S. 510).

11. Because of the conflict of the decision below with the decisions of this Court and those of the Circuit Courts of Appeal in other Circuits in the respects stated, and further because of the confusion produced by the decision with respect to the parol evidence rule and the rule as to integration of contracts, and lastly, because of the existence of Section 33(2) of the Personal Property Law of New York, and its probable application to the cases at bar, questions of great importance to the public are presented, which questions should, we respectfully submit, be reviewed and finally settled by this Court.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue writs of certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court full and complete transcripts of the records herein, to the end that the said causes may be reviewed and determined by this Court as provided by law, and that the judgments of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated, February 2, 1942.

BLACK DIAMOND LINES, INC.,
Petitioner.
By JOHN W. CRANDALL,
Counsel for Petitioner.